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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 292

PRIMROSE SUPER MARKET OF SALEM, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The court of appeals did not file an opinion. The Board's Decision and Order (B.A. 1-25)[1] are reported at 148 NLRB No. 66.

JURISDICTION

The decree of the court of appeals was entered April 7, 1965 (Pet. 18). The petition for a writ of

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[1] "B.A." refers to the portions of the record printed as an appendix to the Board's brief filed in the court of appeals.

certiorari was filed on June 26, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner's Salem store constituted an appropriate bargaining unit.

2. Whether the Board adequately set forth its reasons for finding that petitioner interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pages 19-20 of the petition, and at p. 8, n. 7, *infra*.

STATEMENT

1. *The Board's unit determination.*—On August 9, 1963, following an organizational campaign, the Union [2] informed petitioner that it represented a majority of the employees at its Salem store (B.A. 42-43). On August 13, the Company refused to recognize the Union, contending that the Salem store was not an appropriate unit for bargaining (B.A. 9; 44). The Union filed a charge with the Board and a

[2] Local 1435, Retail Clerks, International Association, AFL-CIO.

complaint was issued alleging that petitioner had unlawfully refused to bargain.[3]

The evidence taken at the unfair labor practice hearing showed that Primrose Super Market of Salem, Massachusetts, is one of five discount supermarkets operated by George Karambelas and his brother Arthur (B.A. 9-11; 31-33, 82). Each supermarket is separately incorporated (B.A. 10, 13; 74-75). The other four stores are located at Peabody, 4 to 5 miles from the Salem store; Georgetown, 20 miles away; Newburyport, 26 miles away; and Haverhill, 28 miles away (B.A. 10; 70, 74-76). The general business policy of each store is determined by the central office in Haverhill. Meat, produce and grocery supervisors determine sales plans, buy all special sale items and supervise the overall operation of their respective departments in each of the five stores (B.A. 11-12; 76, 79, 93). They visit each store several times a week to check on the supply of merchandise and to determine whether orders and retail price changes have been made correctly (B.A. 11-12; 92-93). General Manager George Karambelas also visits each of the stores several times a week (B.A. 12). He makes the final decisions in regard to the number of employees in each store, transfers, promotions and wage increases (B.A. 12; 61).[4]

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[3] It is clear that the Union represented a majority of the employees at the Salem store when petitioner denied the Union's request for recognition (B.A. 27-28).

[4] There is no central warehouse to store merchandise for the five supermarkets (B.A. 15; 88). Most of the merchandise

Each supermarket is run by a store manager, who spends all of his time in the store assigned to him (B.A. 14; 77). Under his immediate supervision are an assistant store manager, heads of the produce, grocery and meat departments and numerous employees, such as cashiers, clerks and baggers (B.A. 14-15; 28, 35-36, 47, 59-60). The store manager handles "the day-to-day duties of the store" (B.A. 14; 76). It is his job to open the store, take money out of the safe, set up the cash registers and make cash deposits at the local bank (B.A. 14; 65, 89). He must insure that his department heads know and conform to their sales plans, have enough of the regular stock and advertised sale items, and display their merchandise correctly (B.A. 14; 66, 93, 95). When there is a shortage of normal (as distinguished from "special sale") items, the store manager may order them directly from suppliers (B.A. 16; 66, 79-80, 98). He ordinarily orders small amounts of produce directly, consulting with the produce supervisor if larger amounts are required (B.A. 16; 79-80).

The store manager sets up the weekly work schedules and determines the number of hours part-time employees are to work (B.A. 14; 60-61, 99). At the end of the week he is responsible for taking the time cards off the rack and figuring out the hours worked (B.A. 14; 90). The store manager determines when employees take rest periods and approves employee requests to leave work early (B.A. 14; 61, 64, 90-91).

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in the Salem store comes directly from suppliers (B.A. 15; 88-89).

He has authority effectively to determine whether layoffs are necessary and, if so, who should be laid off (B.A. 14; 61-62). He also has authority effectively to recommend that employees be hired, discharged, promoted, or transferred (B.A. 14-15; 64-65; 68, 84-86, 87, 97-98).

It is the general practice of all the stores to hire people residing in the city in which the store is located (B.A. 18; 81). Most of the employees of the Salem store are teenagers who live in Salem and work part-time after school (B.A. 17-18; 49, 70, 81, 99).[5] Each store has a separate seniority list and employees are laid off on the basis of their seniority within that particular store (B.A. 16; 62-63). Employees are paid by each supermarket for the work done in that market. If an employee works in two different stores during the same week, he receives two separate checks, representing the time spent in each store (B.A. 49, 53-54, 57).

There is little interchange of employees between the Salem store and the other four stores. During 1962 there were only 12 temporary transfers and 1 permanent transfer of employees into or out of the Salem store (Resp. Exh. No. 7). During 1963, there were 6 permanent transfers and approximately 51 temporary transfers involving the Salem store (Resp. Exh. No. 8). The increased interchange during 1963 was caused by the changeover of operations at all five stores from retail to discount operations (B.A.

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[5] A part-time employee is one who works less than 40 hours a week (B.A. 81).

17-18; 72), a process taking 2 or 3 days, during which time the store undergoing alterations was closed (B.A. 57, 108). The manager of the Salem store was asked by George Karambelas to see whether any Salem store employees would volunteer to work in another store to help convert it to a discount supermarket (B.A. 70-71). Part-time employees from one store were not sent to other stores unless they consented to go (B.A. 18-19; 49, 53, 57-58, 71).[6] In keeping with the Company's policy that employees work as close to their homes as possible (B.A. 109), most transfers of part-time employees involving the Salem store were between it and the Peabody supermarket (B.A. 17; 98, 109-110).

In view of the geographic separation of the Salem store, the substantial authority of the store manager, the minimal interchange of employees between that store and the other stores, and the fact that there was no bargaining history on a broader basis and no union was claiming representation on such basis (B.A. 19; 44), the Board found that the employees at the Salem store constituted an appropriate unit for collective bargaining purposes. Accordingly, the Board concluded that petitioner violated Sections 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the representative of those employees (B.A. 13-19).

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[6] A printing error appears at the top of page 71 of the Board's appendix. The answer to the first question on the page should read, "They didn't have to" (see Transcript of Testimony, p. 205).

2. *The Board's 8(a)(1) findings.*—The Board also concluded that, subsequent to the Union's demand for recognition, petitioner engaged in conduct, violative of Section 8(a)(1) of the Act, in an effort to dissipate the Union's majority status (B.A. 20-25). This conduct included soliciting the employees to withdraw from the Union (B.A. 4-8; 31, 34, 37, 38, 41, 48, 52, 55-56, 76, 77); threatening employees with less favorable working conditions, loss of income and discharge, if the Union came in (B.A. 4-6, 8; 29-30, 33, 36, 41, 46, 50); systematic interrogation of employees concerning their union activities and adherence (B.A. 4-8; 29-30, 36, 37, 41, 46-47, 48, 50, 51, 52, 54, 55, 56, 77); and creating the impression of surveillance of the employees' union activities (B.A. 4, 6-7; 29-30, 48-49, 56). These findings are based on the testimony of several employees which the Trial Examiner expressly credited. The only adverse witness was petitioner's store manager, whose denials were not credited (B.A. 7).

3. *The court's decision.*—The court of appeals enforced the Board's order without qualification (Pet. 18).

ARGUMENT

The decision of the court of appeals is correct. It is not in conflict with the decision of any other court, and there is no occasion for further review.

1. Petitioner concedes that, on the basis of the criteria used by the Board, a single store unit could be found appropriate for collective bargaining pur-

poses. It contends, however, that there was insufficient evidence to support the Board's application of those criteria here. (Pet. 11). Since this contention raises only an evidentiary issue which was resolved against petitioner by the court of appeals, it does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In any event, it is clear from the facts summarized in the Statement (pp. 3-6, *supra*) that there is ample evidentiary support for the Board's unit finding here.

Petitioner's contention (Pet. 12, 15) that the Board violated Section 9(c)(5) of the Act is insubstantial.[7] That provision "was not intended to prohibit the Board from considering the extent of organization as one factor, though not the controlling factor, in its unit determination." *National Labor Relations Board* v. *Metropolitan Life Insurance Company*, 380 U.S. 438, 442. Here, the Board's unit determination was based upon several traditional criteria, clearly articulated in its decision, which, as we have noted, petitioner concedes were appropriate. That the Union may have tried unsuccessfully to organize the employees in some of petitioner's sister stores is not determinative. While this might show that the Union may have been motivated by the extent to which it had organized when it sought a unit confined to the Salem store, it does not establish that the Board was

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[7] Section 9(c)(5) provides that: "In determining whether a unit is appropriate for the purposes [of collective bargaining] the extent to which the employees have organized shall not be controlling."

so motivated in finding that unit to be appropriate. Nor does the fact that in 1960 the Union lost a consent election in a unit comprising all the Primrose stores militate against finding a single store unit appropriate at this time. Cf. *Purity Baking Co.*, 124 NLRB 159, 163; *Univac Division*, 137 NLRB 1232, 1233.

2. Similarly insubstantial is petitioner's contention (Pet. 15-16) that the Trial Examiner failed adequately to set forth the reasons for his Section 8(a)(1) findings. The Trial Examiner's report contains a detailed analysis of the evidence supporting his findings (B.A. 4-8) and the statement that his determinations as to credibility were based upon his "observation of the witnesses" (B.A. 3). These afford a sufficient basis for review. It is not necessary for the trier of fact to engage in a detailed discussion of the physical characteristics or demeanor which prompted his finding. *Paul M. O'Neill International Detective Agency* v. *National Labor Relations Board*, 280 F. 2d 936, 940 (C.A. 3). See also *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 529; *Trumbull Asphalt Co.* v. *National Labor Relations Board*, 314 F. 2d 382, 383 (C.A. 7), certiorari denied, 374 U.S. 808.

Contrary to petitioner (Pet. 16), Section 8(b) of the Administrative Procedure Act does not require Trial Examiners to give detailed reasons for deciding issues of credibility. It simply requires that, "Where oral testimony is conflicting or subject to doubt of its credibility, the credibility of witnesses would be a necessary finding if the facts are material." Administrative Procedure Act — Legislative

History, Sen. Doc. No. 248, 79th Cong., 2d Sess., 210-211, 273. Cf. *American President Lines, Ltd.* v. *National Labor Relations Board*, 340 F. 2d 490, 492 (C.A. 9); *National Labor Relations Board* v. *Witchita Television Corporation*, 277 F.2d 579, 585 (C.A. 10), certiorari denied, 364 U.S. 871. Here, the Trial Examiner made findings based upon his observation of the witnesses; nothing more is required.

CONCLUSION

The petition for a writ of certiorari should be denied.

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